Supreme Court, U.S.
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No. 02-1646

IN THE

Supreme Court of the United States

THE HIGBEE COMPANY, d/b/a
DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

LYNETTE CHAPMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

COUNTER-STATEMENT OF THE CASE

No compelling reasons exist to grant Dillard's petition for a writ of Certiorari. The sole argument of Dillard's Petition for Writ of Certiorari is its assertion that the Sixth Circuit's en banc decision is "in direct conflict with the Third, Fourth, and Eighth Circuits" and that this Court "should grant certiorari to resolve this decisional conflict." (Pet. at pp. 3 and 4). Even a cursory review of the decisions from the Third, Fourth, and Eighth Circuits, however, reveals that the only authorities and support for those seemingly contrary decisions were based upon a fundamentally different version of the statute at issue in this case.

For that reason, Respondent Lynette Chapman ("Chapman") submits that a sound conflict does not exist among the district or circuit courts and that the Sixth Circuit's en banc ruling (like the Second District's similar ruling[1]) was proper and sound in all respects.

Moreover, there have been an extremely limited number of cases since the 1991 amendment where a court has been asked to address the question presented by Dillard's Petition (*i.e.* the scope of the "full and equal benefit" clause under the amended version of Section 1981). As a result, this case does not present a "recurring issue" nor does it appear to be causing such a dilemma for the district and circuit courts such that this Court needs to accept certiorari and provide guidance to those courts at this early juncture of the development of this area of law.

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1. *See Phillip v. University of Rochester*, 316 F.3d 291 (2nd Cir. 2003).

Therefore, Chapman respectfully urges this Honorable Court to deny Dillard's Petition for Writ of Certiorari.

RESPONDENT'S COUNTER-STATEMENT OF THE FACTS

Chapman believes that Dillard's has misstated the facts by omitting certain matters that support Chapman's claim that she was the victim of a racially motivated, improper and unwarranted suspicion, accusation, stop and search for suspected shoplifting by Dillard's.

At the District Court level, the Court was addressing whether state action was a requirement of Section 1981 and the parties were not yet required to present all of their evidence going to the issue of whether Dilliard's actions were race-driven. Nevertheless, some of the evidence presented so far that is missing from Dillard's statement of the "Factual Background" is the fact that a female Caucasian shopper was just exiting the fitting room that Debra Hughes directed Chapman to use. That same sales associate also admitted that she observed clothes already hanging on the back of that particular fitting room's door and that she observed Chapman hang her merchandise on a different hook. After Chapman finished trying on her merchandise and exited the fitting room, a sales associate was waiting at the door to remove the Caucasian customer's merchandise that that customer had left behind. Also, during the stop and search of Chapman, Dillard's ignored and refused her repeated requests for Dillard's to also question the Caucasian shopper.

Contrary to Dillard's statement, by being stopped, questioned and searched, Chapman was clearly being accused

of the crime of shoplifting and was required to prove that she had not stolen anything before she was allowed to leave the store.

Also missing from Dillard's statement is the mention of Dillard's admission that its actions violated its own store and company-wide policies.

ARGUMENT

A. The Sixth Circuit's En Banc Decision *Does Not* Present A True Conflict Among The Courts Of Appeals

Dillard's claim that the Courts of Appeals are "sharply divided on whether the 'full and equal benefit' clause of Section 1981 applies to private actors" (Pet. at p. 15) is without merit. It is true that the Second Circuit is in agreement with the Sixth Circuit's en banc decision below and that the Third, Fourth and Eighth Circuits have *seemingly* ruled just the opposite. A closer examination of the Third, Fourth and Eighth Circuit rulings, however, reveal critical distinctions from the Sixth and Second Circuit decisions.

Relying largely on the clear language of subsection (c) of Section 1981 that was added to the statute in 1991, the Sixth Circuit ruled that "section 1981 plainly protects against impairment of its equal benefit clause [found in subsection (a)] by private discrimination and . . . there is no reason to look beyond section 1981's plain language." *Chapman v. The Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003). Pet. App. 13. The Second Circuit agreed, stating, "we believe that the 1991 amendment removes any doubt that the conduct of private

actors is actionable under the equal benefit clause of Section 1981." *Phillip v. University of Rochester*, 316 F.3d 291, 296 (2nd Cir. 2003).

1. The Third Circuit

In *apparent* contrast to the Sixth Circuit, the Third Circuit, after first noting that a claim under the "full and equal benefit" clause was not raised in the district court and was therefore not properly preserved for appeal, stated that even if that claim was considered, it "would fail in light of a substantial line of authority holding that only state actors can be sued under the 'full and equal benefit' clause of § 1981." *Brown v. Philip Morris Inc.*, 250 F.3d 789, 799 (3rd Cir. 2001). The "substantial line of authority" that the *Brown* case cited and was referring to was *Mahone v. Waddle*, 564 F.2d 1018, 1029 (3rd Cir. 1977); *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F. Supp. 2d 27, 30 n.1 (D. D.C. 1999) (dictum); *Lewis v. J.C. Penny Co.*, 948 F. Supp. 367, 371 (D. Del. 1996); *Sterling v. Kazmierszak*, 983 F. Supp. 1186, 1192 (N.D. Ill. 1997). Even a very cursory review of this "authority," however, reveals the lack of any actual support for the Third Circuit's ruling.

First, *Mahone* examined the pre-1991 version of Section 1981 that contained only the language now comprising subsection (a). Nowhere in that pre-1991 version of the statute was there any of the language now found in subsection (c) that was relied upon by the Sixth (and Second) Circuit.

Similarly, the *Sheppard* decision, although dealing with the amended version of Section 1981, merely cited *Mahone* and two other district court cases as authority for its footnote statement that "[m]ost courts have held that

'the equal benefits' clause . . . requires state action." *Sheppard*, 59 F. Supp. 2d at 30 n.1. All of *Sheppard*'s authority, however, examined only the pre-1991 version of Section 1981. *Id.* Moreover, the *Sheppard* court did not even fully analyze this issue and instead stated, "it is unnecessary for this Court to rule on the defendants' second ground, i.e., whether the equal benefits clause requires state action." *Id.*

For its authority, *Lewis* likewise only cited *Mahone*, which again clearly examined and applied to the pre-1991 version of Section 1981, only. *Lewis*, 948 F. Supp. at 371.

Finally, it is unclear from *Sterling* whether it held that state action was required to establish a claim under the "full and equal benefit" clause of Section 1981 and, even if it did, it surely did not cite any post-1991 amendment cases for authority. *Sterling*, 983 F. Supp. at 1192 ("the parties did not cite and the court could not find any Seventh Circuit decisions which hold that the equal benefits clause creates a federal remedy for state tort law claims where racial animus is alleged.")

Consequently, the Third Circuit in the *Brown* decision, just like all three of the district courts it cited as its authority, failed to explain the fatal distinction between the respective versions of the statute being examined in those cases and failed to justify the continued validity of that authority in light of the clear language to the contrary that is found in the amended statute.

As a result, the reasoning, basis and authority for the Third Circuit's decision is questionable, to say the least, and on closer examination does not present a true, direct or sharp conflict with the Sixth (and Second) Circuit.

2. The Fourth Circuit

Contrary to Dillard's assertion, the Fourth Circuit's ruling in *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir. 1986), *rev'd in part on other grounds*, 481 U.S. 615 (1987), is simply not in conflict with the Sixth Circuit's en banc decision at all. That is because the *Shaare Tefila Congregation* case was clearly examining the pre-1991 version of Section 1981. *Id.* Since the Sixth Circuit was examining the post-1991 version of Section 1981 and, in particular, a provision added to that statute by amendment in 1991, the Sixth Circuit's decision is not in conflict with the Fourth Circuit's decision in *Shaare Tefila Congregation*.

3. The Eighth Circuit

The Eighth Circuit has decided two cases raising the "full and equal benefit" clause found in the post-1991 version of Section 1981. The first, decided September 17, 2001, is *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002). The second, decided November 21, 2001, is *Adams v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769 (8th Cir. 2001). The continued validity and applicability of those decisions is highly suspect.

As the Second Circuit noted, "[t]he *Youngblood* holding rests on [the panel decision in] *Chapman v. Higbee* . . . , an opinion that since has been vacated ... and on dicta in *Mahone v. Waddle* . . . , a pre-[1991] amendment case." *Phillip v. University of Rochester*, 316 F.3d at 294. The Eighth Circuit's decision in the *Adams* case suffers from the same fatal flaw in that it merely cites and relies on *Youngblood* and, in turn, *Youngblood's* quoting of the vacated panel decision

in *Chapman* and the pre-amendment case of *Mahone*. *Adams*, 271 F.3d at 777.

Since both of these decisions from the Eighth Circuit lack any analysis whatsoever as to whether state action is required in a post-1991 amendment case and instead merely rely on a case that has since been vacated and a case that interpreted a prior version of a statute, the continued validity of the Eighth Circuit rulings is negligible. This is especially true when the Eighth Circuit's decisions are compared to the Sixth Circuit en banc decision's thorough analysis of the correct version of the statute. As a result, it cannot and should not be said that the Eighth Circuit is in direct conflict with the Sixth Circuit.

Based upon the extremely limited number of Circuit decisions so far, a clear and direct conflict (much less a "sharp" division) does not exist among the Circuits at this time to provide a basis for this Court to grant Dillard's petition and accept jurisdiction to decide the issue presented by this case.

B. The Sixth Circuit's En Banc Decision Does Not Raise An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Chapman agrees with Dillard's that the scope of the post-amendment version of Section 1981 is an important issue of federal law. Dillard's claim, however, that the questions presented by its petition concern "an important and recurring issue of federal law, Section 1981's proper scope" (Pet. at pp. 6 and 15) and justify this Court granting Dillard's petition, is without merit. Chapman submits that to date, only the Sixth and Second Circuits have truly analyzed the post-amendment version of the statute and that both of those

Circuits have similarly and clearly held that its scope reaches private impairment of the "full and equal benefit" clause. Moreover, this is certainly not a "recurring issue" in light of the nearly twelve year existence of this amended version of the statute and the fact that only five circuit courts have considered this issue, of which only two have truly analyzed this issue.

As a result, the Sixth (and Second) Circuit provides a sound, concrete answer for federal courts to look to and there is no lingering, unanswered question in need of this Court's ruling.

C. The Sixth Circuit's En Banc Decision Does Not Misread The Legislative History And Does Not Lead To Internal Inconsistencies In The Statute

The Sixth Circuit's en banc decision is not "undercut by the legislative history of Section 1981(c)." (Pet. at p. 22). In citing to two of the House Committee Reports on the Civil Rights Act of 1991, Dillard's overlooks the report that stated the addition of subsection (c) was "to strengthen existing protections and remedies available under federal civil rights laws and to provide more effective deterrence and adequate compensation for victims of discrimination." H.R. Rep. No. 102-40(II), at 1, *reprinted in* 1991 U.S.C.C.A.N. at 694. Surely this goal of Congress in enacting subsection (c) is realized and furthered by the Sixth Circuit's en banc decision.

The Sixth Circuit's decision was also not based on a misreading of the language of Section 1981. After all, one would be hard pressed to find a more *un*ambiguous statutory subsection and a more straightforward application of that clear language.

D. The Sixth Circuit's En Banc Decision was Unanimous With Respect To Chapman's Claim That Dillard's Was A State Actor

Dillard's neglects to point out in its Petition that the Sixth Circuit's en banc decision unanimously held that there *is* a question of fact as to whether Dillard's was a state actor. *Chapman*, 319 F.3d 835 (majority) and 843 (dissent). Pet. App. 17-18, 34. Dillard's does not raise this issue as one of its "Questions Presented" to this Court. Pet. p. i.

Therefore, even if a direct conflict existed among the Circuits or even if the Sixth Circuit had found (or this Court were to find) that state action is required for a claim under Section 1981's "full and equal benefit" clause, the District Court's grant of summary judgment in favor of Dillard's would still have been in error.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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